

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<div style="display: flex; justify-content: space-between;"><div>In the Matter of Rules and Regulations Implementing The Telephone Consumer Protection Act of 1991</div><div style="text-align: center;">) ) ) ) )</div></div>	CG Docket No. 05-338
--	----------------------

**Comments of the  
National Newspaper Association  
  
and  
  
Newspaper Association of America  
  
in response to the  
Notice of Proposed Rulemaking on the Junk Fax Prevention Act of 2005**

--

The National Newspaper Association (NNA) and Newspaper Association of America (NAA) together represent the wide majority of newspapers in the United States. Independently operated and governed, the two organizations work together on occasion on matters that affect newspapers of all sizes.

NNA and NAA urge the Commission in this proceeding to adopt a broad view of the Established Business Relationship (EBR) exemption for the transmission of advertising fax communications. Congressional intent to preserve this privilege for business communications was the principal reason for the passage of the Junk Fax Prevention Act of 2005 (JFPA). The Commission has not yet demonstrated that abuse of the EBR is at the root of junk fax problems and therefore has not laid a foundation for new restrictions.

We also urge the Commission to create opt-out regulations that can be faithfully followed by the smallest of businesses in this country, and to be mindful that most local businesses have no need for toll-free telephone numbers, and

some even have no present access to electronic mail. It would be unreasonable to impose new restrictions upon them, absent a clear showing that an abuse of fax distribution is occurring among small businesses.

The Commission has new guidance from Congress for the mission of weeding out the junk from the legitimate business faxes. It should avoid creating new record-keeping burdens and instead focus now upon articulating a sender's burden of proof in enforcement in the event that a recipient claims that a claimed established business relationship is non-existent or has been abused.

These comments begin with a threshold comment upon the underlying rationales for the JFPA and for these implementing regulations, and then will respond to the Commission's questions as they are posed in the NPRM.

The National Newspaper Association is a 2,500 member trade association for community newspapers. Founded in 1885, it serves primarily weekly and small daily newspapers, most of them family-owned. A typical NNA weekly newspaper would have a circulation in the 3,000-5,000 circulation range; a typical daily would be slightly larger, in the 5,000-10,000 range. NNA is headquartered in Columbia, MO and also has offices in Arlington, VA.

The Newspaper Association of America (NAA) is the principal trade association representing daily newspapers. NAA represents more than 2,000 newspapers in the United States and Canada and its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily U.S. newspapers.

**Congress clearly intends for this Commission to pursue abusers of the fax machine, not legitimate business users.**

The Commission is apparently considering various new burdens upon fax senders who rely upon an established business relationship as a demonstration of consent to receive advertising information. The Commission proposes, or implies that it is considering, among other things:

- That a sender might need to “establish that the recipient has agreed to make (the) number publicly available.”
- That a sender might need to make an inquiry about a recipient’s voluntary release of a fax number before it would be permitted to use a number that is publicly available in a directory or on a website.
- That a sender might need to prove to the Commission in a regular regulatory regime that it possessed EBR fax numbers before July 9, 2005.
- That an EBR might be limited to an 18 month/3 month regime, commensurate with time limitations in other telemarketing regulations, and that a sender might be required to create record-keeping systems to measure the duration of its business relationships.
- That a sender might have to acquire and install communications tools for receipt of opt-out notices that it does not now need for any aspect of its business except for compliance with these rules.

These potential new requirements and others that the Commission may be considering, follow a two year colloquy between industry and Congress or the Commission on whether new restrictions upon legitimate fax senders is a reasonable means of addressing the annoyances of “junk fax” that the Commission articulated in its July 3, 2003 rules. We and many others have urged the Commission to more deeply investigate whether the predominant volume of “junk fax” was traveling between businesses and their customers or, as we suspect, between senders of blast faxes to indiscriminate recipients with which the sender has no colorable claim to a business relationship.

The Commission has apparently not engaged in such an investigation. Why it has not continues to be a mystery to the businesses that confront the possibility of yet another new set of punishments for crimes not committed, and a suggested duty imposed by the Commission to establish innocence when barely an aroma of guilt has wafted across the public record.

The exchange between Congressman Edward Markey, ranking member of the House Energy and Commerce Committee and the Commission's witness, former Bureau Chief Dane Snowden, in the first hearings on the JFPA put a spotlight on this problem. This exchange followed Mr. Snowden's assertion that in 2003, the Commission had received about 1,500 complaints a month of junk fax violations, and had in fact just levied a \$5.4 million fine against "fax.com," a purported blast faxer. Mr. Markey wished to know how many of the fax complaints resulted in enforcement actions. Pertinent parts are digested here:

Mr. Markey: Now, how many cases do you bring on those 1,500 complaints, 1,500 a month?

Mr. Snowden. "...We have issued over 233 citations in the past years."

Mr. Markey: "233 citations over how many years?"

Mr. Snowden, "And that is starting, I would say, from 1999 up to now."

Mr. Markey, "So over the last 5 years 200, so that is about 40 a year that you actually—the citations that you bring, but at 1,500 a month, you are looking at like 18,000 complaints a year."

Mr. Snowden: "Correct." <sup>1</sup>

The dialogue further provides an explanation by Mr. Snowden of the difficulty of catching perpetrators: their abilities to conceal their identities, to be found, and, thus, to be successfully prosecuted. Yet, the FCC's rules have contained requirements since 1992 that fax senders must identify themselves by

---

<sup>1</sup> House Report 108-593, 108 H. Rpt. 593, JUNK FAX PREVENTION ACT OF 2004, July 9, 2004, 108<sup>th</sup> Congress, 2d Session June 15, 2004

the sending machine's fax number. 47 C.F.R. §68.318(d). The rules have evidently been obeyed by the law abiding and ignored by the violators whom the FCC would like to catch and prosecute. Yet the FCC cannot find them, according to Mr. Snowden. Fewer than one percent of complainants find relief.

In addition to FCC enforcement, recipients have the right to bring private suits, which has been one avenue for closing the enforcement gap. A prominent advocate of severe limitations upon fax senders, Junkfax.org, regularly posts results from private action lawsuits. On a recent webpage, it listed the organizations it considered offenders of the fax rules, including fax.com, VisionLabTelecommunications, American Blast Fax and others.<sup>2</sup> The names are recognizable to most business owners who harvest annoying faxes from their own machines.

Missing from this list, from the Markey/Snowden colloquy and from any public record since the latest fax regulations emanated from the Commission in 2003 is evidence that junk fax problems are being created by legitimate businesses using the fax machine to communicate with their customers.

And yet the Commission endeavored to layer new regulations upon these legitimate users in 2003, and apparently is considering doing so yet again—all without any demonstration that the legitimate users have created the problem the Commission and Congress are trying to solve.

Congress specifically reinstated the Established Business Relationship (EBR) exemption in the JFPA because it found that the EBR was a fair recognition of legitimate usage. It required the Commission to make specific findings that the EBR was being abused before instituting yet more rules that would burden such usage.<sup>3</sup> The detail with which Congress directs the Commission to provide a

---

<sup>2</sup> [www.junkfax.org/fax/profiles/index.htm](http://www.junkfax.org/fax/profiles/index.htm). A screen shot of the pertinent page is appended.

<sup>3</sup> JFPA Section 2(f).

threshold to justify further EBR regulation demonstrates that Congress seeks more from the Commission than a hopeful hook that may catch a few bad guys, while it paralyzes large numbers of good ones.

The Commission would not discharge the duty required of it under this statute if it simply shifted a burden to fax users to demonstrate why they should not be required to comply with a new set of compliance requirements. It is axiomatic that new regulations require compliance systems. Whether these are large or small, they impose a cost upon the regulated businesses. Were the cost a legitimate exercise to demonstrate that past misdeeds have been repented and that the sinners had reformed their ways, the new costs might be legitimate. Neither NNA nor NAA believe such findings have been made, or likely could be made, because most businesses use the fax machine for legitimate communications, not to purvey unwanted advertising.

The newspaper associations agree that consumer protections are necessary to enable recipients to identify fax senders and to request that no further faxes be sent. The minimal burdens required by listing a sender's fax number, identifying an opt-out avenue, and requiring senders to maintain records of those opt-outs are ones that are clearly warranted by the nature of the problem the Commission endeavors to solve. But these proposals hint of regulations that would go far beyond such sensible rules and would instead require databases and compliance systems that would serve no purpose whatever.

The associations therefore urge the Commission to adhere to the spirit and intent of the JFPA and to adopt only those new regulations that the statute specifically requires and to exercise its discretion lightly in creating new burdens that are not enumerated in the statute.

## **I. Comments on Specific Questions Posed by the Commission**

NNA and NAA address the Commission's specific queries in the order of their appearance in the NPRM, as requested.

### **A. Recognition of the Established Business Relationship Exception**

#### **1. The requirement for written consent should be deleted from the Commission's rules.**

The Commission proposes removing the requirement in Section 64.1200(c)(3) of the rules governing fax transmissions, which would eliminate the requirement for written consent from recipients. The JFPA has expressly substituted the established business relationship as a proxy for more specific consent from recipients. Therefore, it is appropriate for the Commission to delete this section. NNA and NAA agree that in the instance where a recipient requests no further faxes, the consent provided by the EBR is overridden.

#### **2. How fax numbers are acquired**

Prior to the Commission's new fax rules of July 3, 2003, concern with the means by which a fax number was acquired was absent from the regulations. The Junk Fax Prevention Act of 2005 did not contain restrictions on acquisition until the eleventh hour of passage on June 24, 2005, when Sen. Barbara Boxer introduced the language that became subparagraph ii in Section 2(b)(1)(C). The legislative history is virtually silent on the background for this amendment. Having participated in the legislative discussions, NNA and NAA understand Sen. Boxer's intent was to introduce some barriers that would prevent a very large business from using purchased fax numbers to claim an EBR with virtually everyone. Thus, the Commission now seeks to understand whether and how a fax number acquisition would be permitted under the statute.

This deliberation could mislead the Commission into eviscerating the very flexibility for senders that Congress intended to preserve. Congress did not eliminate the record-keeping burdens for tracking written consents only to replace them with the burden of tracking the provenance of a fax number.

Fax numbers are so prolifically available—on business cards, on Internet websites, on financial instruments such as invoices or purchasing orders, even on outdoor signs—that tracking a possession to a point of origin could become an absurdity. As a practical matter, fax numbers are usually provided by recipients orally when they request information by fax. If the Commission insists that senders remember where a number came from, the record-keeping would be even more daunting than the records contemplated in the 2003 rules. Workers would have to keep detailed notes of telephone calls, passing conversations in the street and information transmitted on the golf course.

The problem of dealing with the concerns Senator Boxer raised can be more effectively dealt with in the context of complaints. If a recipient takes action against a sender it believes to have sent an unsolicited advertising fax outside the context of an EBR, the burden would be on the sender to prove the relationship. Use of a fax number illegitimately acquired would become simply one element in unraveling a defendant's bogus claims of privilege.

In the context of regulations, the Commission should simply recognize that a sender in possession of its customer's telephone number is presumed to have the recipient's permission to use it. Should the recipient not desire the number to be used, the statute now provides for an opt-out from the use of that number.

### **3. Grandfathered fax numbers should be afforded the same presumptions of legitimacy.**

The statute permits businesses in possession of fax numbers before July 9, 2005, to be grandfathered, not subject to the voluntariness requirements

discussed above. The Commission wants to know how it should verify that a sender had a number in its possession prior to that date.

Requiring a sender to know on a moment to moment basis *when* it acquired a number is no less problematic than requiring the sender to know *where* the number came from. Like the provenance burden, this bit of knowledge could require still another system of records and eviscerate the intent of the statute.

There are only two possibilities for the role of this subsection in enforcement of the JFPA. The most likely is that the means and timing of a fax number's acquisition will become an element in determining whether or not a legitimate EBR existed between a sender and an unhappy recipient.

The other could occur in an action where a recipient acknowledges the existence of an EBR, but did not want a sender to have possession of its fax number. The likelihood of this second eventuality is so remote that it is almost meaningless. Most recipients will let the sender know it does not want its number used by exercising its opt out rights—i.e. requesting that no faxes be sent. A sender disregarding the opt-out would then face enforcement action under subsection (C)(iii) and the succeeding opt-out requirements in the JFPA.

Could a case arise where an EBR existed, and opt out was exercised and recognized, but the means and date of a fax number's acquisition was the element at issue? Possibly. But not very likely. Enforcement will focus upon the faxes, not the fax number.

A simple recognition in the rules that, in the event of enforcement action by a recipient or a public body like this Commission, a sender could be required to demonstrate when, where and how it acquired a fax number will be sufficient for meeting the intent of Congress.

## **B. Definition of the Established Business Relationship**

### **1. Including business recipients**

The Commission intends to amend its rules to clarify that both business and residential fax numbers are protected by its regulations. NNA and NAA agree that it should do so, as long as recognition of the EBR remains intact.

### **2. Limiting the EBR's duration**

The Commission is considering whether limits on an EBR adopted in its Do Not Call rules (47 C.F.R. 64.1200(f)(4)) are appropriate in the fax context.

We reiterate that we believe new limits on the EBR are premature. The legislative intent is clear that the Commission is invited to consider new limits only after a serious examination of the origins of junk faxes. Because we do not believe the sources of the problem are to be found in legitimate businesses using the fax machine to communicate with their customers, we see no reason for new limits on the EBR.

As the Commission has observed, the nature of the burden upon the consumer in an unwanted telephone call and in an unwanted fax are different. The former occurs in a business to consumer relationship and the latter, typically, in a business to business relationship.

#### **a. Setting limits requires more record-keeping**

Knowing when relationships begin and end requires a system of records. Keeping systems of records requires staff. It requires training in the use of the systems. It requires an interruption of business while the sender of a fax checks the records to see when a relationship began and, possibly, ended. All of those systems and practices create costs<sup>4</sup>.

---

<sup>4</sup> Some businesses may have established some systems for tracking EBRs for telemarketing. However NNA and NAA believe that many of their small market members have abandoned

In the time available for commenting on these queries by the Commission, NNA and NAA have been unable to conduct empirical studies on the size of these costs. But NNA did an informal survey of its small newspaper members in 2003 when the Commission's written consent rules were about to be implemented. At that time, most members said new record-keeping systems would cost them between \$5,000 and \$10,000 a year. These costs may be insignificant to a large business. But for many small newspapers, those amounts are about what they would hope to earn in profits for a year.<sup>5</sup>

**b. Business relationships do not fit into predictable annual cycles**

Newspapers often conduct special promotions that occur only annually and may notify advertisers by fax of the opportunity to participate. Most newspapers—particularly community newspapers—create special sections and issues designed around annual events. For example, the Back to School, the Christmas season, the County Fair, Conference Basketball Tournament, Mothers' Day, Fathers' Day and Independence Day issues are just a sampling of typical special promotions. Businesses might participate in two out of three years, or three out of five. Particularly the small businesses most dependent upon the fax machine not uncommonly will skip a year for participation in an annual newspaper section if cash flows are tight. An 18 month EBR would be inadequate for maintaining these businesses' access to important advertising information.

Similarly a three month limit on EBRs established by inquiry would be inadequate. It is not uncommon for potential advertisers to find out about an advertising opportunity too late—after the newspaper has already hit the streets. The unfortunate potential customer who calls a newspaper promotions manager

---

telemarketing in the post Do-Not-Call era. And many never began, and would have no systems in place for compliance with an EBR duration requirement.

<sup>5</sup> Community newspapers with gross revenues in the \$100,000 range are not unusual in smaller and rural communities. For such a paper, printing, postage and salary costs make profitability a serious challenge.

the day after the Independence Day promotion to ask to be kept informed of the next year's opportunity will be out of luck in a three month EBR. Unless a newspaper is able to set up a filing and training system requiring staff to reinitiate contact with those inquirers through some means other than fax, that new customer will be lost. Most small newspapers lack the staff to keep up with such a tight regime.

### **c. Opt-Out Rules**

The opt-out rules are a critical component of the JFPA. They provide the most meaningful consumer protection against junk faxes that Congress has created since 1991, and give the Commission and other enforcers tools to end fax abuse. NNA and NAA support the opt-out requirements, and believe most of their members had already taken steps to create opt-outs before the law was passed.

#### **1. Clear and Conspicuous**

The Commission seeks comment on how clear and conspicuous an opt-out notice should be.

A notice should be as easily readable as newspaper type. It should be in a place where fax recipients are likely to see it, not at the extreme tops or bottom edges where margins may be cut off.

The Commission should refrain, however, from setting rigid type sizes or font requirements. NNA's inquiries indicate that some newspaper offices continue to use typewriters for clerical functions. A secretary may type a cover sheet for a fax, rather than use a personal computer. The Commission should not assume all senders have the ability to adjust fonts and type sizes or styles.

## **2. Time limit for observing opt-out**

The Commission asks whether 30 days is an appropriate length of time for a sender to comply with the opt-out notification of a recipient. We believe it is.

## **3. How senders should identify themselves**

The sender's fax machine number and the telephone number or email address of the individual in an organization responsible for collecting opt-out requests will not usually be the same. Senders should be required to supply both. The Commission should not dictate the wording of opt-out notification sheets, but permit businesses to use their own words, so long as a valid pathway for the opt-outs is established.

## **4. Cost-Free Opt Outs**

Congress did not specify exactly how an opt-out must be made cost-free.

It certainly did not require a toll-free telephone number, and the absence of such a requirement suggests that it did not see that mechanism as the sole possibility.

Toll free telephone numbers can be quite costly for a small business. They require a set up charge, and they provide measured service. For a local business that does not typically engage in interstate commerce, toll free telephone numbers are unnecessary for the regular course of business. Congress did not intend that they should have to acquire one just to comply with JFPA.

A rule of reason should be used here.

First, businesses that do not send faxes out of their own local exchange areas should have to do no more than provide an answering machine on their business lines for after-hours opt-out calls.

Second, electronic mail notifications should be sufficient in all other cases. While there are some businesses (as we discuss below) with fax machines, but no computers, virtually every community today has a library or an office supply store with a public computer by which an occasional electronic mail can be sent.

## **5. Exempting small businesses**

It may be hard to imagine in the 21<sup>st</sup> Century that there are businesses without computers.

There are. They are becoming fewer. But dozens of them exist.

For example the Wolfe County News in Campton, KY, in the heart of Appalachia is a 2,600 circulation weekly newspaper in a county with only about 6,000 residents, of whom fewer than a third have a high school diploma or above. The newspaper does not use email. People who want to talk to the publisher may telephone or send a letter.

The Liberal News Barton County, Missouri is in a similar situation. Established in 1910, it has a circulation of 625 in a rural southwest corner of the state. The newspaper does not have email capacity and evidently has found no need for it to date.

In both cases, the weekly newspaper is the only local news medium. They may not be important in cyberspace, but they are important to their towns.

Setting parameters for excusing the cost-free requirement may require the Commission to work outside the usual boundaries of Small Business Administration (SBA) definitions. Because measurements of size vary from industry to industry, a limitation based upon numbers of employees may make the most sense. This is the approach taken by many federal statutes with regard to

employment laws. For example, the Family and Medical Leave Act applies to entities with 50 employees or more within a given location. The SBA category for retail and service industry contains an employee limit of 300, without regard to their proximity to a headquarters or to each other. This category most closely fits the small businesses we serve.

## **6. Terminating the EBR; using third-party agents**

The commission asks whether a recipient may opt out of faxes but continue to do business with the sender. We believe businesses should honor requests not to fax, even if the recipient continues to maintain the business relationship in other contexts. For a legitimate business, faxing to a customer who does not want faxes would be nonsensical.

The use of third parties for faxing is not as common in our industry as it may have been a decade ago. However, it seems logical that requests to not to send faxes would generally be prompted by the content of a fax. Therefore the owner of the content should be the entity to whom the opt-out would apply.

## **7. Opting out through avenues not specified in the opt-out notice**

Some businesses may refuse to honor opt-outs made by mail if the opt-out notice specified email; or by in-person communication if the opt-out path was a local phone number. Intentional refusals seem remote and unlikely to us. Businesses do not earn trust with customers by disregarding their wishes. However, we can easily imagine that some businesses—particularly those with frequent turnover as many newspapers have in areas like their classified or circulation sales departments—would struggle to keep all new employees fully trained on procedures. It is not unimaginable that a new employee would receive an opt-out request, not through an official opt-out channel, and not know what to do with it. The Commission should require that the notice be given through the

official opt-out pathway, and recognize that failure to recognize opt-outs will be the exception and not the rule in businesses using the fax in customer relationships.

### **8. Should nonprofits be exempt from the opt-out?**

The opt-out requirement is so critical to the consumer protections in the act that these two trade associations were tempted to say, “no.” Associations, like businesses, have an incentive to communicate with members as the members request. Refusing to take a member off a fax list would not be a good career move for most association employees.

However, the fax machine is a convenient tool for quick messages. Popping an invoice or a convention flier onto a fax machine for a member who telephones for it happens every day. Should that episodic piece have to be accompanied by a sheet with the opt-out information on it? We say such a rule would favor form over function. Members would not expect it. Members would know how to request no further faxes from their organizations. If they find their wishes ignored, they may use a far more powerful tool than the JFPA. They can resign. Associations have a fervent self-interest in avoiding member loss that will trump any regulatory scheme in protecting members from unwanted faxes. Therefore, NNA and NAA believe that nonprofits should be exempt from the opt-out.

### **Conclusion**

Nothing NNA and NAA offer here is intended as a defense for the indefensible. Our own members clamor about junk faxes. They are a nuisance. They are an expense—not a significant one. But the annoyance factor tends to balloon the appearance of expense. No one wants them. No one likes them. It defies reason that senders get enough response to them to justify the sending.

But all advertising faxes are not junk. Most occur in the ordinary course of business between purveyors looking for a sale and customers looking for an

opportunity. Layering on more regulations upon this communication may achieve an appearance of tough enforcement against junk faxers, but the effect will be cosmetic. Junk faxers will ignore the rules. Legitimate businesses will pay an unnecessary price.

NNA and NAA urge the Commission to follow the spirit of the JFPA. An established business relationship distinguishes legitimate faxes from junk. The nature of the relationship will be in the eye of the beholder, not the Commission. When it is abused, recipients have sufficient tools in the opt-out rules, state and federal enforcements and private rights of action to require senders to justify themselves or pay up. Rather than requiring new systems of compliance by senders, the Commission should focus instead on what would constitute a legitimate defense in the event of a complaint.

Respectfully submitted,

Tonda F. Rush  
Counsel/ King & Ballou  
For National Newspaper Association  
PO Box 50301  
Arlington, VA 22205  
(703) 465 8809

Paul Boyle  
Senior Vice President  
Newspaper Association of America  
529 14<sup>th</sup> Street, N.W.  
Suite 440  
Washington, DC 20045  
(202) 783 4697